Supreme Court, U.S.
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No. 02-1739 MAY 27 2003

OFFICE OF THE CLERK

In The
Supreme Court of the United States

WILLIE YOUNG, a.k.a. Punchie,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER, AFTER AN APPEAL BY THE DEFENDANT (WITH NO CROSS-APPEAL BY THE GOVERNMENT), THE COURT OF APPEALS VACATES THE DEFENDANT'S SENTENCE FOR A NEW SENTENCING HEARING, MAY THE GOVERNMENT ADD EVIDENCE TO THE RECORD AND THEREBY HAVE A "SECOND BITE OF THE APPLE" WITHOUT VIOLATING THE DOUBLE JEOPARDY CLAUSE.

II. WHETHER DUE PROCESS OF LAW REQUIRES PROOF BY CLEAR AND CONVINCING EVIDENCE TO PROVE A SENTENCING ENHANCEMENT, WHICH IS SO ENORMOUS THAT IT AMOUNTS TO "A TAIL WHICH WAGS THE DOG OF THE SUBSTANTIVE OFFENSE."

INTERESTED PARTIES

There are no parties to the proceeding other than those named in caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Willie Young respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgement of the United States Court of Appeals for the Eleventh Circuit rendered on December 26, 2002 in the 11th Cir. Case No. 01-14806.

OPINIONS BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which reversed and remanded Young's original sentence in the United States District Court for the Southern District of Florida, is contained in Appendix A (Young I). The second decision of the United States Court of Appeals for the Eleventh Circuit in this case, which affirmed the sentence it previously vacated in the United States District Court of Florida for the Southern District of Florida, is contained in Appendix B (Young II).

STATEMENT OF JURISDICTION

This Petition has been filed within 90 days of February 25, 203; the date the United States Court of Appeals for the Eleventh Circuit denied Young's Petition for Rehearing En Banc, a copy of which is contained in the Appendix C. See Sup. Ct. R. 13. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury;...nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb;... nor be deprived of life, liberty, or property, without due process of law.

STATEMENT OF THE FACTS

On February 5, 1999 a Grand Jury in Miami, Florida indicted Willie Young (Young) and others in the United States District Court for the Southern District of Florida. Regarding the two offenses charged against Young on March 25, 1999, Young was acquitted of conspiracy to possess with intent to distribute heroin and cocaine from July 31, 1986 to June 1998, but he was convicted of the substantive count of possession with intent to distribute an ounce of heroin on May 26, 1996.

Over defense objection, on June 3, 1999, the district court used Young's acquitted conspiratorial conduct as "relevant conduct" to sentence Young to 327 months of imprisonment followed by 6 years of supervised release. The defense argued that under a clear and convincing burden of proof that purported "relevant conduct" was unproven, consistent with the jury's verdict. No physical evidence at trial linked Young to his co-defendant's cocaine dealings, and undercover recorded conversations of that co-defendant (Thompson) revealed that his drug dealings were separate, unrelated, and independent from Young and unknown to him.

Young's offense of conviction under the federal sentencing guidelines provided for a sentence of incarceration of 4 ½ years, however, using his acquitted conduct, the district court sentenced Young to 27 ¼ years in prison. That sentence is nearly 7 times greater than the sentencing guideline penalty provided for by Young's offense at conviction. This case is clearly a case in which the "relevant conduct" amounts to a sentencing enhancement that is "a tail which wags the dog of the substantive offense."

Moreover, without making any individual finding from the record of drug quantity attribution to Young, the district court relied exclusively on the Presentence Investigation Report (PSI), over defense objection, to hold Young responsible for his codefendant's drug dealings. The jury had found Young not guilty of that conspirational conduct. The PSI recommended that Young be held accountable for more than 50 kilograms of cocaine purportedly

purchased by his co-defendant, Thompson, from the government's rogue informant, Patterson. Patterson, himself, had acknowledged that he had had no drug dealings with Young. On August 29, 2000, the Court of Appeals for the Eleventh Circuit affirmed Young's conviction for the sale of an ounce of heroin, but reversed the sentence and remanded for resentencing (A-4). On page 6 of the opinion, the Eleventh Circuit wrote:

> The presentence investigation report (PSI) stated that from July 4, 1994 to October 20, 1995, Thompson sold Patterson "multiple kilos" of cocaine twice a month. Young objected to the statement; the Government therefore had the burden of establishing the quantities of drugs Thompson sold Patterson. The problem we face in this appeal is that the Government offered no evidence--either at trial or at sentencing--to substantiate the PSI statement (A-5).

In Young I, the Eleventh Circuit vacated Young's sentence and remanded for the district court to make "appropriate factual finding" (A-4). This decision did not direct the district court to take further testimony, add transcripts to the record or otherwise supplement the existing record in Young's case. In other words, the appellate decision did not authorize the district court to give the government "a second bite at the apple."

Nonetheless, on May 2, 2001 after remand, the district court overruled the defense's timely objection by permitting the government to supplement Young's record with the transcript of DEA Special Agent Barrett's testimony on June 18, 1999 at the separate sentencing hearing of Young's co-defendant, Thompson. Neither Young nor his counsel attended the hearing on June 18, 1999. Then, on August 14, 2001, after adding the co-defendant's sentencing transcript, the district court again sentenced Young to serve 327 months incarceration followed by 6 years of supervised release. Having preserved the issue for appeal, Young argued that the government was not authorized by the mandate to add to Young's record, and, besides, there was no clear and convincing evidence to hold Young accountable for the conduct of his co-defendant for which he was acquitted. Without explanation and contrary to the facts, the Eleventh Circuit, in Young II, held that the government did not take "a second bite at the apple" and affirmed Young's sentence (B-2). The preponderance of the evidence standard for the government's burden of proof of "relevant conduct" despite its enormous impact on Young's sentence was unchanged in Young II (B).

REASONS FOR GRANTING THE WRIT

I. THE COURT HAS THE OPPORTUNITY TO RESOLVE TWO RECURRING FIFTH AMENDMENT ISSUES IN CONFLICT AMONG THE CIRCUITS, TO WIT: (1) WHETHER AFTER A REMAND FOR INSUFFICIENT EVIDENCE TO PROVE A SENTENCING ENHANCEMENT THE GOVERNMENT MAY ADD TO THE RECORD AND THEREBY "HAVE A SECOND BITE OF THE APPLE" WITHOUT VIOLATING DOUBLE JEOPARDY; AND (2) WHETHER DUE PROCESS REQUIRES PROOF BY CLEAR AND CONVINCING EVIDENCE TO PROVE A SENTENCING ENHANCEMENT WHICH IS SO ENORMOUS THAT IT AMOUNTS TO "A TAIL WHICH WAGS THE DOG OF THE SUBSTANTIVE OFFENSE."

It has been the mission of the federal judiciary over the past quarter century to bring predictability and uniformity to sentencing. The unfettered discretion and arbitrariness at sentencing of a generation ago has been evolving through federal sentencing reform into an orderly procedure designed to eliminate unwarranted sentencing disparity. The sentencing hearing is most often the most significant proceeding in criminal courts. The case at bar offers the High Court the opportunity to close two open wounds on the body of criminal justice which continue to spill pages of ink onto appellate decisions, and place criminal defendants in the untenable posture of having to rely upon their district's geography for determining how sentencing guideline enhancements will impact

on their lives. The open questions presented in this case are so common in appellate decisions that they are identified by hackney metaphors, to wit: (1) may the government after remand in this case, for insufficiency of proof and thereby take "a second bite of the apple," and (2) if the government can supplement the record after remand, then is the Government required to prove by clear and convincing evidence of a sentencing enhancement which amounts to "a tail which wags the dog of the substantive offense."

A. "A Second Bite of the Apple"

In Young I (A), the Eleventh Circuit affirmed Young's conviction for the sale of one ounce of heroin, but reversed and vacated his sentence of 327 months of incarceration. This enormous sentencing enhancement relied upon a theory of "relevant conduct" based on Young's co-defendant's (Thompson's) dealings with a rogue informant (Patterson). Young's jury had acquitted him of conspiring with his codefendants, including Thompson. The government relied on a PSI statement to support this sentencing enhancement. However, since Young's original record disclosed no evidence "at trial or at sentencing--to substantiate the PSI's statement," that enormous enhancement was vacated and the case was remanded (A-5). Specifically, the Eleventh Circuit remanded for "resentencing, at which time appropriate findings may be made" regarding Young's sentence (A-4).

At resentencing the government, over defense's timely objection was permitted to supplement Young's record with a transcript from Young's codefendant's (Thompson's) sentencing hearing. Neither Young nor

his counsel were present at the sentencing of Thompson. Thereupon, the district court again sentenced Young to serve 327 months of incarceration followed by 6 years community control based on the "relevant conduct" of his co-defendant (Thompson)--for which he had been acquitted.

In Young II (B), the Eleventh Circuit found that the district court complied with its mandate and rejected (without explanation) the defendant's argument that the government got a "second bite" at the apple. Of course, logically, no other explanation can be given to justify the resentencing of Young to his original sentence without consideration of the supplementation of the record with Young's codefendant's sentencing transcript. If the government had not been given "a second bite at the apple," then the record would have remained without evidence from either the trial or sentencing hearing "to substantiate the PSI's statement" that Young should be held accountable for his codefendant's conduct, for which he had been acquitted.

In Burks v. United States, 437 U.S. 1, 18 (1978), this Court held that the Double Jeopardy Clause prohibits the government from presenting additional evidence at trial after a conviction is reversed for insufficient evidence. It is time for this Court to extend this constitutional prohibition to the sentencing hearing. No cogent argument can be offered to avoid incorporation of this trial safeguard into the sentencing stage. It is the next logical step in sentencing reform.

At the present time, when considering sentencing hearings after remand for insufficiency the circuits run the spectrum from open de novo hearings to closed review from only the existing record. For example, in United States v. Fernandez-Angulo, 897 F.2d 1514, 1516-1517 (9th Cir. 1990) (en banc); and United States v. Gutierrez-Hernandez, 94 F.3d 582, 585 (9th Cir. 1996) the Ninth Circuit held it will remand for sentencing on an open record--without limitation on the evidence that the district court may consider. The Eighth Circuit has taken an opposite tact in United States v. Monroe, 978 F.2d 433, 435-36 (8th Cir. 1992); and United States v. Hudson, 129 F.3d 994, 995 (8th Cir. 1997) (per curiam) where remand for resentencing may only be made on the existing record.

Significantly the facts in Hudson are strikingly similar to those in the case at bar. In Hudson, the district erred by adopting the federal findings of the PSI; despite defense's timely objection--on remand the government was foreclosed from supplementing the existing record. Had Young been sentenced in the Eighth Circuit instead of the Eleventh Circuit, he would have faced a prison sentence of not more than 51 months, rather 327 months of prison he received in the Southern District of Florida. This disparity, predicated only on geography, is contrary to the indisputable goal of federal sentencing reform, which is the elimination of unwarranted sentencing disparity.

Other circuits, such as the Third Circuit, have taken a middle position on this issue. In United States v. Dickler, 64 F.3d 818, 831-32 (3rd Cir. 1995) the Third Circuit held, "where the government has the burden of production and persuasion, its case should ordinarily

have to stand or fall on the record it makes the first time around," but added that under certain particular matters, such as a victim's loss, the district may consider additional evidence at resentencing. Then there are circuits like the Eleventh Circuit, which sometimes employ a de novo rational, and other times employ a closed record rational after remand. As noted above, in the ruling of Young II the Eleventh Circuit avoided the issue, but did so without a logical explanation, since the government clearly was given "a second bite of the apple" despite the decision's denial of that event.

In Jackson v. Virginia, 443 U.S. 307, 316 (1979), this Court held, "no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof." The Eleventh Circuit in United States v. Lawrence, 47 F.3d 1559, 1566 (11th Cir. 1995) held the government bears the burden of proving the amount of drugs to be attributed to the defendant when he challenges that amount. Obviously, if the government is afforded "a second bite at the apple" to meet its burden of proof, then a defendant's challenge for sufficiency of the evidence at his sentencing will be reduced to a fool's errand, and the government's burden of proof will dissolve into a legal fiction. Moreover, it would be an absurd result for a party, who had chosen not to appeal a point, to stand better with regard to the "law of the case," than the party that was granted appellate relief. United States v. Escobar-Urrego, 110 F.3d 1556, 1560 (11th Cir. 1997).

It has long been well-settled law under the "mandate rule" that a trial court acting under an appellate court's mandate cannot very it, or examine it

for any other purpose than execution; or give any other relief; or review it, even for apparent error, upon a matter decided. In re: Sanford Fork and Tool Co., 160 U.S. 247, 255 (1895). The "mandate rule" is an application of "the law of the case" doctrine. Piambo v. Bailey, 757 F.2d 1112,1120 (11th Cir. 1985). It is predicated on the ancient premise that "there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions or speculate on chances from changes in its members." Robert v. Cooper, 20 Howard 467, 61 U.S. 467 (1858).

It is a denial of the Double Jeopardy Clause and the Due Process Clause of the Fifth Amendment to the U.S. Constitution if the government is given "a second bite at the apple" after it failed to meet its burden of proof when obliged to do so at the first sentencing hearing. The time is ripe for this Court to bring uniformity and predictability to this sentencing issue.

B. "A Tail which Wags the Dog"

In Young I, the Eleventh Circuit stated, "conduct for which a defendant has been acquitted may be considered 'relevant conduct' for sentencing purposes if the defendant is shown by a preponderance of the evidence to have engaged therein" (A-4). In support of this principle that court cited United States v. Watts, 519 U.S. 148, 117 S. Ct. 633 (1997). However, this Court in Watts alerted Courts of Appeal that the preponderance standard may not be applicable in all cases, as follows:

> We acknowledge a divergence of opinion among the Circuits as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence... The cases before us today do not present such exceptional circumstances, and we therefore do not address that issue. 117 S.Ct. 637, 638.

That case is now before the Court and this persistent appellate issue is ripe for resolution. This question has been lingering in the federal courts for a long time. In McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986) the Court noted that the preponderance of the evidence standard was appropriate where there was no allegation that the sentencing enhancement was "a tail which wags the dog of the substantive offense." Likewise, in Justice White's dissent to the denial of the petition for writ of certiorari in Kinder v. United States, 504 U.S. 946, 948-49 (1992) this issue was raised as one which was ripe for resolution by the High Court.

Young's jury acquitted him of conspiracy to possess with intent to distribute both heroin and cocaine with several alleged codefendants, including Roger Thompson. Young's only offense of conviction involved the sale of slightly less than one ounce of heroin. The presentence investigation report (PSI) revealed a criminal history IV for Young. Thus, the U.S.S.G. § 2D1.1(11) with a criminal history IV, provided for a sentencing range of 41 months to 51 months incarceration for Young. The PSI claimed that Young should be held accountable as "relevant conduct" for the cocaine dealings of his codefendant,

Thompson, with a rogue informant, Henry Patterson. Young's original record did not substantiate this claim (A-6). Based on Thompson's sentencing hearing, which neither Young or his counsel attended; the DEA case agent testified that Thompson and Patterson engaged in the sale of 50 kilograms of cocaine.

Over defense objection, this transcript was added to Young's record after remand. U.S.S.G. § 2D1.1(2) at criminal history IV provides for a sentencing range in this case of 262 to 327 months incarceration. Young was sentenced and resentenced to the maximum penalty of 327 months incarceration, even though he was only convicted of selling less than an ounce of heroin, based on his acquitted conduct. The jury's verdict of not guilty was nullified. This is a generational enhancement in Young's sentence, increasing his offense base level from 18 to 36. Since this case involves "a tail which wags the dog of the substantive offense" it affords this Court the opportunity to resolve this long lingering unsettled sentencing issue dealing with the government's burden of proof under these circumstances and thereby, eliminate unwarranted disparity among the circuit at sentencing hearing.

Prior to the resentencing, after the remand, there was no evidence at trial or sentencing hearing to support the PSI's recommendation that Young be held accountable for his codefendant's 50-kilogram cocaine deals with the government informer. After the remand, the government supplemented the record with testimony from Young's co-defendant's separate sentencing hearing to establish the 50 kilograms of sales by codefendant Thompson. In

Young I, the Eleventh Circuit held that based on a preponderance of the evidence standard in accord with United States v. Averi, 922 F.2d 765, 766 (11th Cir. 1991). Young was held responsible for those cocaine deals involving his codefendant, co-defendant Thompson (A-4). Had the higher standard of proof (i.e. by clear and convincing evidence) been employed, that finding of attribution to Young could not have been made by the court.

Many Courts of Appeal have concluded that the Eleventh Circuit's ruling in Averi, supra is inappropriate where the sentencing enhancement is enormous, as it is in the instant case. See, e.g., United States v. Gigante, 94 F.3d 53 (2d Cir. 1996); United States v. Kikumuna, 918 F.2d 1084 (3d Cir. 1990); United States v. Megerson, 4 F.3d 337 (5th Cir. 1993); United States v. Corbin, 998 F.2d 1377 (7th Cir. 1993); United States v. Tomnley, 929 F.2d 365 (8th Cir. 1991); and United States v. Hopper, 177 F.3d 824 (9th Cir. 1999).

In Matthew v. Eldridge, 424 U.S. 319, 334-35 (1976) this Court held that the amount of due process increases under the Fifth Amendment with the degree of the liberty interest at stake in the preceeding. The type of due process a person receives should not depend upon where the defendant's chair is located in this country. Had Young been tried in a district where the clear and convincing evidence standard is employed to judge the proof of a sentencing enhancement with enormous impact, then he would have been sentence to serve only 51 months of incarceration, not the 327 months incarceration he received. Federal sentencing reform cannot continue to

tolerate this unwarranted sentencing disparity among the circuits. It is time for this Court to speak in a clear voice to resolve this unsettled and recurring sentencing issue.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that his Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit be granted.

Respectfully submitted,

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APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED SATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-11566
Non-Argument Calendar

D.C. Docket No. 97-00662-CR-2-KMM-1

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

WILLIE YOUNG, a.k.a. Punchie,
ROGER THOMPSON, a.k.a. Black Pete,
Defendants-Appellants.

[Entered August 29, 2000]

Appeals from the United States District Court
for the Southern District of Florida

Before TJOFLAT, BLACK and MARCUS, Circuit Judges.
PER CURIAM:

In a multi-count (redacted) indictment, Willie Young and Roger Thompson were charged, in Count One, with conspiring with one another and with Rickey Brownlee from July 31, 1986 to June 26, 1998 to possess with intent to distribute cocaine and heroin, in

violation of 21 U.S.C. § 846 (1994). In addition, Young was charged in Count Three with possession with intent to distribute heroin on May 24, 1996, and Thompson was charged in Counts Two and Four with possession with intent to distribute cocaine on April 3, 1996 and December 17, 1996, all in violation of 21 U.S.C. § 841(a)(1) (1994). Young and Thompson were tried together; a jury acquitted them of the conspiracy offense, but convicted them of the substantive offenses. Young now appeals his conviction and sentence; Thompson appeals his sentences.

Background

Notwithstanding appellants' acquittal on the conspiracy charge, the evidence before the jury (and therefore the district court at sentencing) established that Brownlee began drug trafficking in Opa Locka, Florida, on July 31, 1986. Beginning in 1984, Brownlee, who had a ready supply of heroin and cocaine and a sizeable distribution system, employed Young as a middleman for distribution and sale of his heroin; Young also served as an "enforcer" for the Brownlee organization. At the same time, Brownlee employed Thompson as a middleman to distribute kilogram quantities of cocaine to would be purchasers. Until they were arrested, appellants were present at or were directly involved in numerous drug transactions; persons seeking to purchase narcotics from the Brownlee organization would contact a distributor, such as Young and Thompson, negotiate a price, and agree to a time and place for the completion of the transaction. Many of these transactions took place with Government informers, who were supervised by DEA agents.

Young's Appeal

Young's brief presents two issues. The first relates to his conviction: "Whether... he was denied his constitutional rights of Due Process to present his defense and Compulsory Process to call favorable witnesses who were offered pursuant to Federal Rule of Evidence 404(b), by the district court's exclusion of witnesses who would have testified that the Government's informant, [Katrina Johnson,] had the special skills to conceal objects on her person and deceive Government agents about her conduct." The second issue concerns Young's sentence: "Whether the district court erred when [in fashioning his sentence it relied] upon acquitted conspiratorial conduct which is not supported by a preponderance of specific and reliable evidence to show that [he] jointly undertook criminal activity with his alleged co-conspirators."

Addressing the first issue, we note first that Young did not testify in his own defense (neither did Thompson). What he complains of is the court's exclusion of testimony Young proffered in an attempt to bolster his lawyer's closing argument to the jury that informant Johnson had not engaged in a heroin deal with Young. The testimony would have shown that Johnson was skilled at shoplifting and had given misleading statements to a law enforcement officer; hence, according to Young, the jury may have disbelieved her statements to a DEA agent (who was monitoring Johnson's activity) concerning her transaction with Young. We find no abuse of discretion in the court's refusal to allow the testimony, and therefore affirm Young's conviction.

Young attacks his sentence on the ground that the court erred in treating as relevant conduct under the Guidelines conduct for which he had been acquitted, and in finding him responsible for Thompson's course of drug dealings. We reject the argument that the court was precluded from using conduct for which Thompson had been acquitted in determining his relevant conduct. Conduct for which a defendant has been acquitted may be considered "relevant conduct" for sentencing purposes if the defendant is shown by a preponderance of the evidence to have engaged therein. United States v. Watts, 519 U.S. 148, 155-57, 117 S.Ct. 633, 637-38, 136 L. Ed. 2d 554 (1997); United States v. Averi, 922 F.2d 765, 766 (11th Cir. 1991). However, in holding Young responsible for Thompson's cocaine trafficking - in quantities that totaled over 50 kilograms - the court erred; it failed to make the appropriate factual finding concerning Thompson's activity. We therefore vacate Young's sentence and remand the case for further resentencing, at which time appropriate findings may be made - regarding the quantity of drugs Thompson trafficked and for which Young should be held accountable - and Young can be afforded an opportunity to object thereto. We explain below why the vacation of Young's sentence is necessary.

When a defendant has participated in jointly undertaken criminal activity, relevant conduct includes "all reasonably foreseeable acts and omissions of others in furtherance" of such activity. See U.S. Sentencing Guidelines Manual § 1B1.3(a)(1)(B) (1998). In deciding whether to include the acts or omissions of others, the court must first make an individualized finding as to

the scope of the criminal activity the defendant undertook. See United States v. Beasley, 2 F.3d 1551, 1561 (11th Cir. 1993). In a drug trafficking case, the court then must determine the quantity of drugs reasonably foreseeable at the defendant's level of participation. Id. If the court makes no findings regarding such quantity, we may nonetheless uphold the sentence if the record supports the amount of drugs the court attributed to the defendant. Id.

In this case, the court did not err in holding Young responsible for Thompson's course of dealings with informant Patterson. As noted above, in addition to distributing heroin for Brownlee, Young served as his enforcer. In that capacity, and as the district court found, he knew about Thompson's activities, which included (according to Thompson in a recorded conversation) the distribution of multiple kilograms of cocaine to Patterson each month. See U.S.S.G. § 1B1.3, comment. (n.2(c)(4)) (showing example where court should hold defendant, who is the assistant of a wholesale distributor and frequently supervises deliveries to customers, responsible for the entire quantity distributed by the distributor.)

The presentence investigation report (PSI) stated that from July 4, 1994, to October 20, 1995, Thompson sold Patterson "multiple kilos" of cocaine twice a month. Young objected to the statement; the Government therefore had the burden of establishing the quantities of drugs Thompson sold Patterson. The problem we face in this appeal is that the Government offered no evidence - either at trial or at sentencing - to substantiate the PSI's statement. "Multiple kilos" is,

obviously, an unspecified amount. (At Thompson's sentencing hearing, the Government presented testimony of DEA Agent Robert Barrett that Thompson sold Patterson about "two" kilograms of cocaine twice a month; however, Barrett's testimony was not before the court at Young's sentencing hearing.) In sum, the court erred in relying on the PSI's multiple kilograms statement when it arrived at the drug quantities (trafficked by Thompson) for which Young should be held accountable.

Thompson's appeal

Like Young, Thompson contends that, in determining his relevant conduct, the district court erred in including activity for which he had been acquitted. As we hold in disposing of Young's appeal, there was no error. Thompson contends alternatively that if the Guidelines permitted the court to consider conduct for which he was acquitted, the court erred when it relied on hearsay testimony in making its drug-quantity calculation and holding him accountable for at least 50 kilograms of cocaine. The court should not have relied on the testimony because, he argues, it was unreliable.

The testimony at issue came from DEA Agent Barrett. He testified that in a tape recorded conversation with informant Johnson, Thompson stated that Patterson would come twice a month for two kilograms of cocaine; on one occasion, Patterson received ten kilograms. This tape recording corroborated what the informants, Patterson and Johnson, told the DEA agents during the course of the

agency's investigation of the Brownlee drug trafficking organization. Although the court did not make specific findings concerning the reliability of Barrett's testimony, the record contains ample indicia of reliability. In short, we find no error in the court's attribution of in excess of 50 kilograms of cocaine to Thompson, and therefore affirm his sentence.

AFFIRMED, in part, VACATED and REMANDED, in part.

APPENDIX B

[DO NOT PUBLISH]

IN THE UNITED SATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-14806

D.C. Docket NO. 97-00662-CR-2-KMM

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

WILLIE YOUNG, a.k.a. Punchie,
Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Florida

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(December 26, 2002)
[Entered December 26, 2002]

Before EDMONDSON, Chief Judge, DUBINA, Circuit Judge, and HODGES*, District Judge.

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* Honorable Wm. Terrell Hodges, United States District Judge for the Middle District of Florida, sitting by designation.

PER CURIAM:

Appellant Willie Young appeals his sentence imposed by the United States District Court for the Southern District of Florida for distribution of heroin, in violation of 21 U.S.C. § 841(a)(1).[1]

After reviewing the record, reading the parties briefs, and having the benefit of oral argument, we affirm Young's sentence because the district court, on remand, clearly complied with our earlier mandate and the record does not support Young's argument that the government got a "second bite" at the apple.

AFFIRMED.

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[1] This is the second time that we have had an opportunity to consider this case. Young previously appealed his conviction and sentence. In that appeal, we affirmed Young's conviction, vacated his sentence, and remanded the case for resentencing. *United States v. Young*, 99-11566 (August 29, 2000).

APPENDIX C

[DO NOT PUBLISH]

IN THE UNITED SATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-14806 BB

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

WILLIE YOUNG, a.k.a. Punchie,
Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Florida

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[Entered February 25, 2003]

ON PETITION FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir. 19__, ___ F.2d ____).

Before: EDMONDSON, Chief Judge, DUBINA, Circuit Judge, and HODGES*, District Judge.

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* Honorable Wm. Terrell Hodges, United States District Judge for the Middle District of Florida, sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
Joel F. Dubina
United States Circuit Judge